xSTATE OF IOWA

DEPARTMENT OF COMMERCE

UTILITIES BOARD

IN RE: FIBERCOMM, L.C., FOREST CITY TELECOM, INC., HEART OF IOWA COMMUNICATIONS, INC., INDEPENDENT NETWORKS, L.C., AND LOST NATION-ELWOOD TELEPHONE COMPANY, Complainants, vs. AT&T COMMUNICATIONS OF THE MIDWEST, INC., Respondent.	DOCKET NO. FCU-00-3

ORDER DENYING MOTION TO REOPEN HEARING AND RECORD

(Issued September 6, 2001)

On April 23, 2001, two intervenors in this docket, Laurens Municipal Broadband Communications Utility and Coon Rapids Municipal Communications Utility (Intervenors), jointly filed a motion to reopen the hearing and the record in this docket, pursuant to 199 IAC 7.7(15) (2001). Intervenors attached three sets of prefiled testimony to their motion, which they allege would refute certain testimony offered by another witness in this proceeding. The proposed testimony describes three situations in which a representative of AT&T Communications of the Midwest, Inc. (AT&T), Respondent in this matter, contacted one of the Intervenors or one of

their customers and marketed AT&T's long distance services. Each of the contacts occurred in April 2001, after the hearing in this matter was concluded.

Intervenors argue the post-hearing contacts show that AT&T will, in fact, attempt to conduct business with customers who choose to take local exchange service from Intervenors, regardless of the fact that Intervenors do not have an ASR on file with AT&T. Intervenors believe these contacts show that AT&T has not taken effective steps to train its service representatives not to solicit these CLEC customers; that AT&T does not maintain a "scrub list" to prevent solicitation of such customers; that AT&T does not have a national policy of requiring an ASR from a CLEC before offering service to the CLEC's customers; and that AT&T is still intentionally soliciting these CLEC customers, all contrary to the testimony of an AT&T witness in this proceeding.

On May 2, 2001, AT&T filed a resistance to the Intervenors' motion. AT&T argues the new evidence is too late to be considered by the Board, as it was filed approximately one month after the close of the hearing in this matter. AT&T also argues the new evidence is merely cumulative and therefore irrelevant, because it amounts to nothing more than three more instances in which AT&T telemarketers are alleged to have tried to sign up a customer of a CLEC with which AT&T does not have a business relationship. AT&T argues that its witness already acknowledged, on the record, that with millions of customer contacts each year, AT&T is bound to have some erroneous contacts. AT&T submits that there is no proof any of these customers actually received AT&T service, demonstrating that it applies sufficient safeguards when processing customer orders to prevent fulfillment of any erroneous

orders. Finally, AT&T argues that because the alleged new evidence proves nothing that is not already in the record, the new evidence is cumulative and not material and should be excluded, by analogy to R. Civ. P. 244.

On May 11, 2001, Intervenors filed a reply to AT&T's resistance, arguing their new evidence was not filed too late, as it did not exist until after the close of the hearing in this docket and was filed with the Board at the earliest opportunity. Intervenors reiterate their belief that the new evidence proves AT&T is not really committed to not soliciting these CLEC customers. Intervenors further argue the evidence is not merely cumulative because the number of these errors is relevant to show that AT&T's claims regarding its normal behavior are not, in fact, representative of AT&T's normal behavior.

The Board will deny the motion to reopen the hearing and the record. Rule 7.7(15) provides that, upon motion of a party or its own motion, the Board "may" reopen the record to receive further evidence and that such a motion may be filed at "any time prior to the issuance of a final decision." Thus, the Intervenors' motion is not untimely. However, the proffered new evidence is merely cumulative and unduly repetitious and should therefore be excluded, pursuant to Iowa Code § 17A.14(1) (2001).

The Intervenors' new evidence amounts to nothing more than three additional instances in which AT&T offered long distance service to customers of the Intervenors. The record in this proceeding already contains a number of examples of this behavior on the part of AT&T, and the AT&T witness has admitted that in its nationwide telemarketing efforts, involving millions of customer contacts each year, it

is impossible for the telemarketers to know, at the time they are calling the customer, which LEC the customer has chosen. (Tr. 677.) The AT&T witness also testified that "AT&T's efforts to avoid marketing to a CLEC's customers … are not perfect." (Tr. 692.) As a result, it is inevitable that an AT&T marketing representative will sometimes contact a customer of a CLEC with which AT&T denies having a business relationship. The Intervenors (and other parties) have offered evidence of precisely such occurrences. The Board understands the Intervenors' argument to the effect that the total number of these instances tends to demonstrate that AT&T's claims are not true, but the Board does not accept that three additional occurrences is enough to prove anything that is not already supported in the record, making the proposed late-filed evidence "unduly repetitious." Therefore, the Board will deny the motion to reopen the hearing and the record, pursuant to Iowa Code § 17A.14(1).

IT IS THEREFORE ORDERED:

The "Motion To Reopen Hearing (Reopen The Record)" filed April 23, 2001, by Laurens Municipal Broadband Communications Utility and Coon Rapids Municipal Communications Utility, is denied.

UTILITIES BOARD

/s/ Allan T. Thoms

/s/ Diane Munns

ATTEST:

/s/ Judi K. Cooper
Executive Secretary

/s/ Mark O. Lambert

Dated at Des Moines, Iowa, this 6th day of September, 2001.